

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA**

SHELIA ROCHELLE NEAL,)	
)	
Petitioner,)	
)	
v.)	
)	1:11CV529
)	1:09CR261-3
)	
UNITED STATES OF AMERICA,)	
)	
Respondent.)	
)	
)	

MEMORANDUM OPINION AND ORDER

Before the Court are Petitioner Shelia¹ Rochelle Neal's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence [Doc. #64²], Recommendation of United States Magistrate Judge [Doc. #99], Petitioner's Motion for Reduction of Sentence (Pursuant to 18 U.S.C. § 3582(c)(2)) [Doc. #101], and Petitioner's Notice of Appeal of Magistrate Judge's Order [Doc.

¹ The Indictment, Plea Agreement, Judgment, and Petitioner's recent Notice of Appeal, among other filings, name Petitioner as Shelia Rochelle Neal. Docs. #1, 29, 41, 108. However, other filings identify Petitioner as Sheila Rochelle Neal. See, e.g., Docs. #64, 72, 74, 101, 104. Because the Indictment in the related criminal case, 09CR261-3, names Petitioner as Shelia Rochelle Neal, this Memorandum Opinion and Order refers to Petitioner in the same manner.

²All cites to docket entries refer to the criminal case: 09CR261-3.

#108]. For the reasons that follow, the Recommendation of United States Magistrate Judge [Doc. #99] is ADOPTED, and Petitioner's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence [Doc. #64] is DENIED. To the extent that the Magistrate Judge's October 4, 2013 Order [Doc. #105] is treated as a Recommendation of United States Magistrate Judge as to Petitioner's Motion for Reduction in Sentence (Pursuant to 18 U.S.C. § 3582(c)(2)) and Petitioner's Notice of Appeal [Doc. #108] is treated as an objection to the Recommendation, the Recommendation of United States Magistrate Judge is ADOPTED, and Petitioner's Motion for Reduction in Sentence (Pursuant to 18 U.S.C. § 3582(c)(2)) is DENIED. To the extent that the Magistrate Judge's October 4, 2013 Order [Doc. #105] treated Petitioner's Motion for Reduction in Sentence (Pursuant to 18 U.S.C. § 3582(c)(2)) as a Motion to Amend her previously filed Motion Under 28 U.S.C. § 2255 and denied such amendment after which Petitioner filed a Notice of Appeal, Petitioner's Notice of Appeal [Doc. #108] is DENIED.

I.

On June 4, 2010, Petitioner was sentenced to the then-mandatory minimum sentence of imprisonment of 120 months for violating 21 U.S.C. § 846 and 841(b)(1)(A), conspiracy to distribute 500 grams or more of a mixture

and substance containing a detectable amount of cocaine hydrochloride and conspiracy to distribute 50 grams or more of a mixture and substance containing a detectable amount of cocaine base. The Fourth Circuit affirmed the sentence and issued its mandate on April 26, 2011. Docs. #57, 60.

On July 5, 2011, Petitioner filed a Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence. Doc. #64. On March 28, 2013, Magistrate Judge Joe L. Webster issued a Recommendation denying Petitioner's § 2255 Motion. Doc. #99. Any objections that Petitioner may have had to Judge Webster's Recommendation were due April 15, 2013. Doc. #100; see also, e.g., Rule 8(b) of Rules for Section 2255 Proceedings. Petitioner did not file any objections to the Recommendation. "[I]n the absence of any timely filed objection, a district court need not conduct a de novo review, but instead must 'only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation.'" Diamond v. Colonial Life & Accident Ins. Co., 416 F.3d 310, 315 (4th Cir. 2005) (quoting Fed. R. Civ. P. 72 advisory committee's notes). Judge Webster's Recommendation, Doc. #99, has been reviewed, and, finding no clear error on the face of the record, is adopted and Petitioner's Motion Under § 2255 to Vacate, Set Aside, or Correct Sentence, Doc. #64, is denied.

II.

After the time for objections to Judge Webster's Recommendation denying Petitioner's Motion Under § 2255 to Vacate, Set Aside, or Correct Sentence, Petitioner filed a Motion for Reduction of Sentence (Pursuant to 18 U.S.C. § 3582(c)(2)). Doc. #101. Apparently, the Motion Under § 3582(c)(2) was docketed as a Motion Under § 2255, and Petitioner filed a letter requesting the docket entry be corrected to reflect a Motion Under § 3582(c)(2). Doc. #104. On October 4, 2013, Judge Webster entered an Order in which he evaluated Petitioner's Motion as she requested, under 18 U.S.C. § 3582(c)(2), and in the alternative, as a Motion to Amend Petitioner's Motion Under § 2255. Doc. #105. Judge Webster denied Petitioner's Motion under 18 U.S.C. § 3582(c)(2), concluding that a § 3582 proceeding was not the proper vehicle to pursue relief based on Petitioner's argument that Fair Sentencing Act changes to statutory mandatory minimums applied retroactively to her case. Id. at 2.

Judge Webster then considered Docket Number 101 as a Motion to Amend Petitioner's Motion Under § 2255 so that she could assert the aforementioned argument. Id. Judge Webster denied the Motion to Amend, because Fair Sentencing Act changes to statutory mandatory minimums are not retroactive and amending the Motion Under § 2255 to assert otherwise would

have been futile. Id. at 3. Petitioner filed a Notice of Appeal of Judge Webster's Order on October 11, 2013. Doc. # 108 (signed by Petitioner on October 11, 2013, file-stamped October 22, 2013, and docketed as having been filed October 23, 2013). The Notice of Appeal states in its entirety:

Comes now, the Defendant, Shelia Rochelle Neal, appearing pro se and files this Notice of Appeal. The Defendant appeals the ORDER by the Honorable Magistrate Judge Joe L. Webster on October 04, 2013 [Doc. No. 105] denying her relief under her Motion for Reduction of Sentence (Pursuant to 18 U.S.C. §3582(c)(2) [sic]; which was misconstrued as a Motion to Vacate, Set Aside or Correct Sentence [Doc. No. 101].

A decision concerning Petitioner's Motion for Reduction of Sentence (Pursuant to 18 U.S.C. § 3582(c)(2)) is dispositive; therefore, the portion of Judge Webster's Order denying Petitioner's Motion Under § 3582(c)(2) is treated as a Recommendation. See 28 U.S.C. § 636(b)(1)(B). Construing Petitioner's Notice of Appeal as a timely objection to the Recommendation denying her Motion Under § 3582(c)(2), there is no clear error on the face of the record. See Smith v. Nun, 98 F.3d 1335 (4th Cir. 1996) ("Because general objections do not direct the court's attention to any specific portions of the report, general objections to a magistrate judge's report are tantamount to a failure to object."); Orpiano v. Johnson, 687 F.2d 44, 47 (4th Cir. 1982) (explaining that de novo review has been found unnecessary "when a party

makes general and conclusory objections that do not direct the court to a specific error in the magistrate's proposed findings and recommendations") cited in Smith, 98 F.3d 1335. Cf. United States v. Midgette, 478 F.3d 616, 621 (4th Cir. 2007) ("[28 U.S.C. §] 636(b)(1) does not countenance a form of generalized objection to cover all issues addressed by the magistrate judge; it contemplates that a party's objection to a magistrate judge's report be specific and particularized, as the statute directs the district court to review only *"those portions* of the report or *specified* proposed findings or recommendations *to which objection is made.*") (emphasis in original). Therefore, the portion of Judge Webster's Order, Doc. # 105, denying Petitioner's Motion Under § 3582(c)(2), which is treated as a Recommendation, is adopted, and Petitioner's Motion for Reduction of Sentence (Pursuant to 18 U.S.C. § 3582(c)(2)) [Doc. #101] is denied.

The portion of Judge Webster's Order evaluating Docket Number 101 as a Motion to Amend Petitioner's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence is non-dispositive. Cf. 28 U.S.C. § 636(b)(1)(A). Therefore, Petitioner's Notice of Appeal is construed as a timely objection to the Order denying her Motion to Amend. Finding that the denial of Petitioner's Motion to Amend is not contrary to law and that there is no clear error,

Petitioner's Notice of Appeal [Doc. #108] is denied.

III.

The Court adopts the Magistrate Judge's Recommendation [Doc. #99] and the portion of the Magistrate Judge's Order [Doc. #105] construing Docket Number 101 as a Motion for Reduction of Sentence (Pursuant to 18 U.S.C. § 3582(c)(2)). IT IS THEREFORE ORDERED that Petitioner's Motion Under § 2255 to Vacate, Set Aside, or Correct Sentence [Doc. #64] is DENIED; that Petitioner's Motion for Reduction of Sentence (Pursuant to 18 U.S.C. § 3582(c)(2)) [Doc. #101] is DENIED; and that Petitioner's Notice of Appeal, [Doc. #108] is DENIED. Finding no substantial issue for appeal concerning the denial of a constitutional right affecting the conviction, nor a debatable procedural ruling, a certificate of appealability is not issued. A judgment dismissing this action will be entered contemporaneously with this Order.

This the 23rd of February, 2015.

/s/ N. Carlton Tilley, Jr.
Senior United States District Judge